

EXHIBIT A

DEFENDANTS MOTION TO DISMISS

Voltz-Loomis v. McMaster

5:20-cv-01533-DCC

Hearing Transcript

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

* * * * * * * * * * *
JEANNE VOLTZ-LOOMIS, ET AL., * CIVIL NO. 5:20-CV-01533
* JULY 1, 2020 10:20 A.M.
Petitioners, * STATUS CONFERENCE
*
vs.
*
HENRY MCMASTER, ET AL., * Before:
* HONORABLE DONALD C. COGGINS, JR.
* UNITED STATES DISTRICT JUDGE
Defendants. * DISTRICT OF SOUTH CAROLINA
* * * * *

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Proceedings recorded by mechanical stenography, transcript produced by computer.

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US District Court
District of South Carolina

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1 (Court convened at 10:20 a.m.)

2 THE COURT: Thank you. Please be seated. All
3 right, folks. We're here for a status conference in the
4 Voltz-Loomis, et al. versus McMaster, et al. Case No.
5 20-1533. I will note for the record that pursuant to the
6 current District operating order, we have some people
7 appearing by video conference, and we also have at least one
8 attorney on the phone listening in by way of phone conference.
9 Again, with respect to current operating procedures and Chief
10 Judge Harwell's order regarding mask wearing in the
11 courthouse, I'll note everybody is appropriately attired with
12 a mask or face covering. With regard to that, I will tell you
13 that you will need to keep your mask on throughout the course
14 of the hearing. Except if you are speaking, you can lower
15 your mask because it is easier for the court reporter to be
16 able to tell what you're saying. But other than that, please
17 keep your mask on. And I want to apologize for the delay in
18 getting started this morning. We had some technical issues
19 which unfortunately happen from time to time in this new
20 atmosphere of video conferences and remote hearings.

21 Now, folks, as you might imagine, given the nature
22 of the pleadings, and the scope of the pleadings, and the
23 relief requested, my staff and I have spent a good deal of
24 time on this case already. Normally, when we have a status
25 conference or a hearing the lawyers do most of the talking and

1 then I just say something at the end. This morning is going
2 to be a little different. This morning I'm going to give you
3 my thoughts and impressions for what they're worth, and then I
4 will be happy to hear from you folks. I apologize for reading
5 to you in advance. But quite frankly, the breadth of what I
6 need to cover is such that I need to have some fairly direct
7 notes in order to make sure I don't leave anything out.

8 At the outset, I want to let all of you know that
9 this Court is acutely aware of the gravity of the COVID-19
10 pandemic in South Carolina. As all of you are aware, our
11 numbers have increased exponentially, especially within the
12 last several days, which is very alarming from a public health
13 perspective. Members of the federal bench in South Carolina
14 are having regular meetings, mostly by telephone, and are
15 being briefed regularly about the pandemic both from DHEC
16 representatives as well as some of the primary healthcare
17 providers at the Medical University of South Carolina. And we
18 have significantly altered our daily functioning as a result,
19 as you can tell from the standing orders that Judge Harwell
20 has issued that I referenced earlier. That said, I want to
21 emphasize to each of you that this is a courtroom and not a
22 legislative chamber. This Court is charged with interpreting
23 and enforcing the law. It does not create law. Now, to be
24 sure, federal courts do have a significant role in national
25 emergencies like this COVID-19 pandemic both internally and

1 externally. The courts have an obligation to ensure the
2 orderly and fairness position of civil and criminal cases in
3 an environment that makes doing so very difficult these days,
4 and we are often called to arbitrate the legality or
5 constitutionality of legislative and executive action or
6 inaction.

7 After reviewing the pleadings in this case and the
8 briefing from the parties, this Court has grave concerns that
9 the petitioners are asking this Court to act in a
10 quasi-legislative capacity. One of the main remedies that the
11 petitioners are seeking, that is the creation of a Corona
12 Virus release committee with a court-appointed Special Master,
13 is an unprecedented step. Habeas corpus is an extraordinary
14 writ, which is rarely used by the federal courts. And that is
15 due in no small part to Congress having enacted the
16 Antiterrorism and Effective Death Penalty Act of 1996, which
17 significantly limits the federal court's authority to issue
18 the writ. But the petitioners in this case are not just
19 asking this Court to take that extraordinary step; instead,
20 they are asking me to delegate my limited authority to public
21 health and public safety experts. And yet you have not
22 provided me with any legal authority to delegate my Article
23 III authority to a committee of lay persons. If this Court
24 were to take such a step, I am confident that Fourth Circuit
25 and/or the Supreme Court of the United States would intervene

1 before the ink was dry on my opinion.

2 Moreover, I am alarmed at the breadth of the
3 petition. Very few successful cases brought by inmates across
4 the country have typically dealt with high-risk inmates at
5 specific correctional facilities. However, here, the
6 petitioners are asking this Court to issue a ruling, albeit
7 indirectly by way of a committee of public health experts,
8 that applies to all SCDC inmates. Significantly, as of this
9 morning, several SCDC facilities, including Leath, Lieber,
10 Palmer, and Ridgeland have had zero-confirmed cases of
11 COVID-19 in staff or inmates. Other facilities have had zero
12 confirmed cases at least among inmates, even though they have
13 had cases among the staff. In fact, as of the information
14 that I have available to me this morning, out of 21 SCDC
15 facilities only six have had inmate infections, although three
16 or four of those have had significant numbers of infections.

17 In a perfect world, we would not have to consider
18 the relative risk of COVID-19 infection on prisoners as a
19 court could simply commute custodial sentences to
20 non-custodial sentences such as home confinement. But the
21 reality is that there are many inmates in the South Carolina
22 Department of Corrections who are simply too dangerous to
23 release to society, and each of those inmates was sentenced to
24 his or her term of imprisonment by a state judge after a trial
25 or guilty plea. Each of those inmates had the opportunity to

1 appeal, file for state post conviction relief, and seek the
2 extraordinary writ of habeas corpus in a federal court. And
3 while the COVID-19 pandemic is causing far too many deaths
4 across the country, and the world, it does not transform the
5 black letter of the law. Only legislators can do that.

6 I am not insensitive to the petitioners' concerns
7 however. Many of the named petitioners and the class members
8 they seek to represent are at risk for COVID-19 in the South
9 Carolina Department of Corrections. It pains me to think of
10 the fear that these inmates must live in on a daily basis. I
11 am a federal judge, but I am also a citizen of the State of
12 South Carolina, and the recent increase in cases is nothing
13 short of terrifying. We have set records each of the last
14 three or four days. Our state government has made it clear
15 that it considers compliance with CDC and World Health
16 Organization guidelines a matter of personal responsibility
17 rather than a subject for government regulation. But this
18 Court does not have the constitutional authority to weigh in
19 on matters of public policy; instead, I have a constitutional
20 mandate to resolve cases and controversies. And cases like
21 this must be decided based on the law, not on the emotion or
22 equitable considerations.

23 The Court is also somewhat perplexed at the
24 petitioners' litigation strategy and their filings in this
25 case. A few days after this petition was filed, the

1 petitioners filed a motion to expedite, which the Court
2 granted. In that motion, the petitioners requested expedited
3 consideration of the petition and asked the Court to "schedule
4 a hearing immediately thereafter." But the petitioners have
5 not filed a motion for preliminary injunction, a motion for
6 class certification, or any other filings to expedite
7 consideration of this case. While the caption of the petition
8 states that it is a "complaint for injunctive and declaratory
9 relief," but there is no request for an injunction. The word
10 "injunction" or "injunctive" is only mentioned three times in
11 the complaint. Once in the caption, once in a quoted
12 statement of the law, and once when discussing the application
13 of Federal Rules of Civil Procedure 23(b)(2). Even to the
14 extent this Court might want to act emergently, there is
15 currently no basis to do so on the pleadings before the Court.

16 Additionally, when the Court scheduled a hearing in
17 this case, it proved very difficult to secure the attendance
18 of any of the petitioners' attorneys. The Court certainly
19 understands that some of the petitioners' counsel live out of
20 state and others have age or health considerations that
21 justifiably preclude their appearing in court; however, it is
22 important to remember that the petitioners filed this case and
23 asked the Court to set aside other pressing matters to resolve
24 this case on an expedited basis. Going forward, I expect the
25 petitioners to have an attorney available to attend any

1 hearings that are scheduled in this case absent extraordinary
2 circumstances. I certainly appreciate Mr. Winn's attendance
3 today, but the parties need to understand that my staff and I
4 have devoted substantial time and resources to accommodate the
5 petitioners' request for a hearing. We have endeavored to
6 make this courtroom a safe environment for the lawyers and
7 parties, and, absent a justifiable reason, counsel should
8 attend all hearings in the future.

9 Now, let me turn to the substance of the
10 petitioners' case. The petitioners' extraordinary request
11 relies in large part on a District Court decision from the
12 Northern District of Ohio, that case being Wilson versus
13 Williams. That decision addressed a case brought by inmates
14 at Elkton Federal Correctional Institution who brought an
15 emergency habeas action seeking release from Elkton due to the
16 spread of COVID-19 within the prison. The case was filed on
17 April 13, 2020. And the District Court held a hearing on the
18 petitioners' motion for preliminary injunction on April 17th,
19 2020, and the parties filed supplemental briefing the
20 following day. I also note that the Court issued an order
21 granting the preliminary injunction in part on April 22nd,
22 nine days after that petition was filed.

23 At the time of filing, Elkton, which houses 2,400
24 inmates, had 59 confirmed cases of COVID-19 among inmates and
25 an additional 46 cases among staff members. Despite the

1 rapidly increasing number of COVID-19 cases, Elkton had very
2 few tests available. The inmates brought suit seeking relief
3 for a class of all Elkton inmates as well as a subclass of
4 medically vulnerable inmates. And the inmates defined their
5 proposed subclass as follows, and I quote:

6 All current and future persons incarcerated at
7 Elkton over the age of 50, as well as all current and future
8 persons incarcerated at Elkton of any age who experience
9 chronic lung disease or moderate to severe asthma; serious
10 heart conditions; conditions that can cause a person to be
11 immunocompromised; including cancer treatment, smoking, bone
12 marrow or organ transplantation, immune deficiencies, poorly
13 controlled HIV or AIDS or prolonged use of corticosteroids and
14 other immune weakening medications, severe obesity -- defined
15 as a body mass index of 40 or higher -- diabetes, chronic
16 kidney disease or undergoing dialysis; or liver disease.

17 That case was filed pursuant to Title 28 United
18 States Code § 2241, and the inmates sought a temporary
19 restraining order, a preliminary injunction, a permanent
20 injunction and/or a writ of habeas corpus requiring the
21 respondents to identify within six hours of the Court's order
22 all medically-vulnerable subclass members and to release those
23 individuals within 24 hours. Additionally, the inmates asked
24 the District Court to order the Federal Bureau of Prisons to
25 include supports to ensure social distancing and other expert

1 recommended measures to prevent spread of Corona Virus. After
2 the release of the subclass members, the petitioners requested
3 "a plan to be immediately submitted to the Court and overseen
4 by a qualified public health expert that provides for
5 mitigation efforts in line with CDC guidelines and housing
6 and/or public support plan for released inmates." They also
7 sought the release of class members so that the remaining
8 inmates could follow CDC guidance to maintain six feet of
9 space between them while in the prison. The immediacy and
10 scope of the relief that the inmates sought in that case was
11 astonishing. Not only did they seek immediate release of a
12 large number of inmates, seemingly without any individualized
13 public safety evaluation, they also sought a court order
14 requiring the BOP to provide the released inmates with housing
15 and public support, all within a 24-hour period.

16 The District Court began its analysis by noting that
17 Section 2241 was the appropriate vehicle for, quote, claims
18 challenging the execution or manner in which a sentence is
19 served, closed quote. The District Court then found that the
20 petitioner subclass definition is likely too broad, and
21 limited the subclass to individuals that the Centers for
22 Disease Control defined at being at higher risk, which
23 included all inmates 65 years or older, and those with
24 documented, pre-existing medical conditions including heart,
25 lung, kidney, liver conditions, diabetes, conditions causing a

1 person to be immunocompromised, and severe obesity. The Court
2 excluded inmates whose only risk factor is a history of
3 smoking, given the difficulty of documenting such occurrence
4 and identifying those individuals through BOP records alone.
5 Based on this limited subclass, the District Court found that
6 the inmates made a sufficient showing to satisfy the Rule
7 23(a) factors.

8 The Court then turned to the preliminary injunction
9 factors, and found that the inmates were likely to succeed on
10 the merits of their claims, that they would suffer irreparable
11 harm absent an injunction, that they could be moved to, quote,
12 various other types of confinement so that they are no longer
13 at risk of dying from the virus, closed quote, and that the
14 public interest was served by granting the injunctive relief
15 requested. In light of these findings, the Court ordered the
16 Bureau of Prisons to identify within one day all members of
17 the subclass. Following that identification, the Court
18 ordered the BOP to evaluate each member's eligibility for
19 transfer out of Elkton through any means, including but not
20 limited to compassionate release, parole or community
21 supervision, transfer furlough, or non-transfer furlough
22 within two weeks. In the event a subclass member did not fall
23 into one of these categories of release, the District Court
24 ordered that they, quote, be transferred to another BOP
25 facility where appropriate measures such as testing and

1 single-cell placement, or social distancing, may be
2 accomplished, closed quote. Nearly a month later, on May 19,
3 2020, the District Court issued an enforcement order, due to
4 BOP failure to comply with the preliminary injunction.

5 Not surprisingly, the Government appealed to the
6 Sixth Circuit. Prior to oral argument, on June 4th, 2020,
7 Justice Sonia Sotomayor stayed the District Court's order
8 pending disposition of the Government's appeal, and the next
9 day the Sixth Circuit heard oral arguments in the case. Four
10 days later, on June 9th, 2020, the Sixth Circuit issued an
11 opinion vacating the preliminary injunction. A majority of
12 the panel found that the inmates were not likely to succeed on
13 the subjective prong of their Eighth Amendment deliberate
14 indifference claim. The panel found that the BOP had, quote,
15 responded reasonably to the risk, closed quote, and therefore
16 had not been deliberately indifferent to the inmates' rights.
17 The panel detailed the BOP six-phase action plan to reduce the
18 risk of COVID-19 spread at Elkton, and found that, quote, the
19 BOP's efforts to expand testing demonstrate the opposite of a
20 disregard of a serious health risk, closed quote. The panel
21 further noted that other Circuit Courts, including the
22 Eleventh and the Fifth Circuits, have similarly concluded that
23 similar actions by prison officials, quote, demonstrate a
24 reasonable response to the risk posed by COVID-19, closed
25 quote. Chief Judge Cole concurred in part and dissented in

1 part, agreeing with the panel's finding that jurisdiction was
2 proper but disagreeing with the panel's vacatur of the
3 preliminary injunction. That case is now back pending on the
4 merits in the District Court.

5 Now, for our purposes there are several salient
6 points that this Court takes away from the Williams case.
7 First, the Court notes that Williams dealt with widespread
8 COVID-19 infections at a single facility. Second, the
9 petitioners in Williams named two respondents, Elkton's warden
10 and the director of BOP. Finally, even the District Court in
11 Williams found that the proposed subclass was too broad.
12 Extrapolating those points to this case, I would note that the
13 petitioners' claims deal with all SCDC inmates, including
14 those at facilities that have had no COVID-19 infections.
15 Moreover, petitioners have named a number of respondents who
16 are, quite frankly, not proper defendants to a habeas claim,
17 and petitioners have not named the wardens at any of the SCDC
18 facilities. And finally, the proposed subclasses in this case
19 are exceedingly broad.

20 To illustrate that point I would note that the
21 petitioners in this case have plead six subclasses:

22 Number 1. People in custody who are over the age of
23 50 as to whom the SCDC has no basis to contend that the
24 release of those older inmates would pose any threat to the
25 community.

1 Number 2. People in custody who have serious
2 underlying medical conditions that put them at particular risk
3 of serious harm or death from COVID-19.

4 Number 3. People in custody with serious
5 developmental disabilities or mental conditions accompanied
6 with an inability to maintain good hygiene habits or an
7 inability to take medications as directed.

8 Number 4. People in custody who are within six
9 months of their anticipated release date and qualify for home
10 detention pursuant to Section 24-13-1530 of the South Carolina
11 Code of Laws.

12 Number 5. People in custody who are eligible for
13 parole and who have been disciplinary free for the past year.

14 And Number 6. People in custody for technical
15 violations of parole or probation.

16 Folks, these subclasses are far too broad.
17 Conceivably, inmates on death row could fall into one or more
18 petitioners' subclasses, as could inmates in facilities where
19 there are no COVID-19 infections, nor have there been any.
20 Petitioners caution that the relief they are seeking by
21 placing the onus on respondents to show, quote, why the public
22 health and safety of the community, closed quote, would
23 preclude immediate release. That would require hundreds if
24 not thousands of individualized public safety determinations
25 made pursuant to guidelines presumably created by this

1 committee that the petitioners are asking for this Court to
2 create. That is simply not feasible given the breadth of
3 these subclasses. This Court would strongly suggest that
4 petitioners reevaluate the breadth of their subclasses if this
5 case gets past dispositive motions.

6 Now, that brings the Court to one of the most
7 obvious problems with the petitioners' requested relief and
8 that is that South Carolina state law simply does not provide
9 many avenues for any official or governmental body to legally
10 release inmates at risk for COVID-19. While petitioners can
11 argue that it is bad public policy, it most certainly poses
12 serious problems for the goals they are seeking to achieve
13 through this litigation.

14 At the outset of this case, the Court posed a number
15 of interrogatories to the respondents to better understand the
16 spread of COVID-19 in SCDC facilities. And one of the issues
17 the Court wanted to better understand was what mechanisms
18 exist for releasing inmates at risk for COVID-19
19 complications. The respondents informed this Court that,
20 quote, SCDC has no statutory or other authority for releasing
21 inmates based upon the COVID-19 pandemic, closed quote, and
22 that, quote, SCDC has no power to shorten or amend an inmate's
23 sentence, closed quote. Additionally, in response to a
24 question asking the respondents to, quote, identify every
25 statute or regulation that authorizes respondents to release

1 an inmate early from his or her term of imprisonment, closed
2 quote, the respondents identified twelve statutes. Each of
3 these statutes deals with the Board of Paroles and Pardons
4 criteria for granting parole; provisional parole orders;
5 special parole with persons needing psychiatric care; parole
6 for terminally ill, geriatric, or permanently disabled
7 inmates; or pardons. There simply does not appear to be any
8 mechanism for anyone other than the Board of Paroles and
9 Pardons to release anyone from SCDC. And certainly, the SCDC
10 and the governor do not have any authority to do so.

11 Now, the Court understands that the fundamental
12 remedy available in habeas corpus actions is the release of an
13 inmate from custody, and that remedy is independent of any
14 state statute permitting release for other reasons. But, as I
15 will discuss with you in a few moments, there are a number of
16 significant problems with the manner in which petitioners have
17 pled their habeas claims. The absence of any state statutes
18 meaningfully permitting early release perhaps, in a way,
19 illustrates why petitioners have brought such a sweeping
20 lawsuit, but it also significantly distinguishes the remedies
21 that the petitioners request in this case from the actions
22 this Court and other federal courts have taken in response to
23 COVID-19 for federal inmates.

24 And this provides as good a time as any for me to
25 discuss how compassionate release is functioning in the

1 federal courts. I am sure all of you are familiar with this
2 Court's order in the case of United States v Griggs, where I
3 granted compassionate release to a federal inmate at FCI
4 Butner. I believe it was one of the first, if not the first,
5 COVID-19 related compassionate release orders in this
6 District. In that case, Mr. Griggs was serving a 25-month
7 sentence for being a felon in possession of more than 25
8 firearms, including several stolen firearms. Mr. Griggs would
9 have received a significantly higher sentence but-for his
10 medical conditions as his case was one of the more egregious
11 felon in possession cases this Court has encountered.
12 However, despite the Court's feelings about the severity of
13 Mr. Griggs criminal conduct, I was faced with a difficult
14 decision under unique circumstances. It is important for you
15 to understand the state of federal law to understand the
16 import of the Griggs decision. Prior to passage of the First
17 Step Act, only the BOP could move the Court for compassionate
18 release of an incarcerated defendant for extraordinary and
19 compelling reasons under Title 18 United States Code §
20 3582(c)(1)(A)(i). With the passage of the First Step Act,
21 inmates may now move for compassionate release after they have
22 exhausted their administrative remedies. And under the unique
23 circumstances of Mr. Griggs' case, the Court very reluctantly
24 granted his motion for compassionate release.

25 I understand that there may be some temptation by

1 the parties to use Griggs in an attempt to read the tea leaves
2 as to what the Court might do in this case. To do so would be
3 a mistake. Congress has established a clear administrative
4 process for federal inmates with health conditions or other
5 extraordinary circumstances to seek early release. If an
6 inmate's request is denied, he or she may then petition the
7 federal court for release. Even prior to the First Step Act,
8 BOP had the statutory authority to move for compassionate
9 release. South Carolina has no such law, and if there was
10 such a process, it would almost certainly require judicial
11 review by the state courts, not a federal court.

12 In the absence of any state statute allowing for the
13 widespread release of inmates from the SCDC, the petitioners
14 have chosen to file a class action pursuant to Section 2254.
15 It looks like petitioners may have alternatively pled under
16 Section 2241, though paragraph 81 of the petition refers to
17 alternative pleading under Section 2441. A District Court in
18 the Northern District of Illinois addressed a very similar
19 case in Money versus Pritzker. That Court started its
20 analysis of the habeas claims by stating the well-established
21 requirement that prior to filing a habeas petition in federal
22 court, a petitioner seeking relief from state custody must
23 exhaust available state remedies, which means the petitioner
24 has fully and fairly presented his claims to the state or
25 appellate courts, thus giving the state courts a meaningful

1 opportunity to consider the substance of the claims that he
2 later presents in his federal challenge. The Court further
3 noted that this exhaustion requirement serves an interest in
4 federal-state comity by giving state courts the first
5 opportunity to address and correct potential violations of a
6 prisoner's federal rights.

7 The petitioners here attempt to excuse their failure
8 to exhaust by claiming that it would be futile and that state
9 remedies are unavailable. Petitioners claim that there are no
10 state remedies available, and note that the South Carolina
11 Post Conviction Relief Act would not permit a challenge like
12 the one they are bringing in this case. While petitioners are
13 correct that the Supreme Court of South Carolina limited the
14 scope of the PCR Act in the case of Al-Shabazz versus State,
15 they failed to note that there is still a writ of habeas
16 corpus available to South Carolina inmates.

17 The South Carolina Supreme Court noted in Gibson v.
18 State and the site for that is 495 S.E 2nd 426 (1998) case.
19 That, quote, Habeas corpus continues to be available as a
20 constitutional remedy provided a petitioner qualifies for this
21 extraordinary relief and clears the procedural hurdles, closed
22 quote. The Supreme Court explained that the purpose of habeas
23 corpus is to test the legality of the prisoner's present
24 detention. And the only remedy that can be granted is release
25 from custody. However, quote, Habeas corpus is available only

1 when other remedies such as PCR, are inadequate or
2 unavailable, closed quote. Accordingly, the state courts can
3 entertain a petition for a writ of habeas corpus when a
4 petitioner is challenging detention but not challenging the
5 validity of his or her conviction or sentence. Based on the
6 language of the Supreme Court's remand in Gibson, it appears
7 that such petition may be filed in the Circuit Courts of South
8 Carolina and should contain an allegation that PCR remedies
9 have been exhausted or, quote, factual justification why other
10 remedies, such as PCR, are unavailable or inadequate, closed
11 quote.

12 Additionally or, perhaps alternatively, petitioners
13 could seek habeas relief in the original jurisdiction of the
14 Supreme Court of South Carolina. Such petition commonly known
15 as Butler Petitions based on the 1990 Supreme Court case of
16 Butler versus State. That case is 397 S.E. 2nd 87. Moreover,
17 to the extent any petitioners are denied parole, those
18 decisions can be challenged under the Administrative
19 Procedures Act. At any rate, in sum, the petitioners do have
20 several remedies available to them in state court. Those
21 remedies are only available in the most extraordinary of
22 circumstances, but so too is the federal habeas corpus relief,
23 particularly when requested on a class-wide basis.

24 Now, petitioners claim that the state courts are not
25 functioning at full capacity, and attempt to use this

1 justification to file directly in federal Court. To that end,
2 petitioner notes in paragraph 85 of their petition that state
3 court remedies would be ineffective in protecting petitioners'
4 federal constitutional rights, particularly given reduced
5 court function as a response to the COVID-19 outbreak. While
6 petitioners are correct that the state courts are operating in
7 a limited capacity, so too are the federal courts. I will
8 also note at the time of the filing of this petition, the
9 courts were in a much more limited condition than they are
10 today. In fact, it is my understanding that our state court
11 across the street in the Spartanburg County Courthouse has
12 resumed operation just this week with mask requirement such as
13 the federal Court is requiring here. While petitioners are
14 correct that the -- excuse me. State courts are hearing
15 emergency civil matters, and this case would certainly qualify
16 in the category of cases that a state court would hear under
17 the circumstances. In fact, the Supreme Court of South
18 Carolina recently heard an original jurisdiction action
19 involving absentee voting and held those arguments remotely by
20 video, and that case is Bailey versus South Carolina State
21 Election Commission.

22 I would note that it is unclear whether the
23 petitioners in this case have named the correct parties to
24 their habeas action. They have not named the wardens of any
25 correctional institutions and instead they have named the

1 Governor, SCDC's director, the Board of Pardons and Paroles,
2 and the members of that Board. The only respondent that is
3 conceivably appropriate based upon the initial review by this
4 Court would be Director Stirling. Petitioners are not in the
5 custody of any of the remaining respondents. Nonetheless, the
6 Court may not even need to reach this issue, as the
7 petitioners, quote, have not made a satisfactory showing that
8 the state court system was not every bit as available as the
9 federal courts, if not more so, closed quote. To be frank
10 with the parties, the Court does not see any avenue to habeas
11 corpus relief on the pleadings as they are currently before
12 the Court.

13 Now, I would like to touch on the petitioners'
14 request for declaratory relief. The petitioners seek a
15 declaration that SCDC's policies violate petitioners' Eighth
16 and Fourteenth Amendment rights against cruel and unusual
17 punishment. At first blush, this appears to be a cognizable
18 claim, at least as to Respondent Bryan Stirling; however it is
19 a claim that will likely require extensive written discovery,
20 depositions, and potentially a lengthy trial. It is also a
21 claim that likely does not lend itself to this position on a
22 class-wide basis. For example, how could SCDC's policies
23 violate the constitutional rights of inmates in facilities
24 where there are no COVID-19 infections? Moreover, at the end
25 of the day, even if petitioners prevail on this claim, the

1 only relief the Court can award is a declaration of rights.

2 Petitioners' declaratory judgment request is also
3 likely insufficient to justify petitioners' request for
4 attorneys' fees and costs. Petitioners have not pled a cause
5 of action under 42 U. S. C. § 1983. Nor have they pled any
6 statutory cause of action that would entitle them to
7 attorneys' fees under 42 U. S. C. § 1988. It appears to me that
8 this issue is relatively straightforward, which is illustrated
9 to my mind by petitioners' failure to even address the issue
10 in their briefing.

11 Now, less the petitioners feel that the Court is
12 picking on them, let me turn to the respondents. I want to
13 make clear that there are circumstances in which federal
14 courts may properly get involved in adjudicating prison
15 condition cases related to COVID-19. As the Sixth Circuit
16 explained in Williams, when a prison official acts with both
17 subjective and objective deliberate indifference to the
18 constitutional rights of the inmate, habeas relief under
19 Section 2241 would likely be warranted. The Constitution does
20 not permit inhumane prison conditions. Additionally, it is
21 possible that many of the problems that the Court has pointed
22 out could be remedied by the petitioners through amendment or
23 exhaustion of claims in state court. Obviously, that process
24 will take time and it will be exceedingly costly to both
25 sides.

1 So where does that leave us? As all of you should
2 realize by now, this Court has grave concerns about whether
3 any of petitioners' claims as currently pled will survive the
4 pending motions to dismiss. And the Court is inclined to
5 dismiss all petitioners' claims except for the declaratory
6 judgment claim against Director Stirling and possibly Governor
7 McMaster. This Court was hopeful that the parties would be
8 able to reach an amicable agreement at mediation, but that did
9 not occur. Hopefully, the parties now have a better
10 understanding of where the Court currently stands relative to
11 the petition. And I would strongly encourage the parties to
12 engage in additional discussion. I want to emphasize to the
13 respondents that even if this Court grants their motions to
14 dismiss, they may have a long road of amendments, discovery,
15 dispositive motions, and trials in their future. And I do
16 want to note that while SCDC's record has been exemplary given
17 the number of facilities and inmates in their custody, there
18 are a handful of institutions where there is obviously a
19 problem.

20 It seems to me, that at the end of the day, all of
21 the parties in this case want the same thing. And that is to
22 protect these inmates that are in the care and custody of
23 SCDC. Litigation is necessarily an adversarial process, but
24 it is not always the best process to achieve good results for
25 the parties. The petitioners are represented by very capable

1 and experienced counsel, as are the respondents in this case.
2 The parties who are stakeholders in this case care about the
3 health and safety of every individual in SCDC custody. The
4 Court is aware of efforts made by Director Stirling in this
5 regard, and the Court knows him to be a civil servant who has
6 selflessly served for the betterment of South Carolina
7 inmates. I believe that if the parties are willing to be
8 reasonable and talk to each other with these shared goals in
9 mind, you may be surprised at the goals you were able to
10 achieve. Will further discussions result in a mass release of
11 inmates from SCDC custody? Absolutely not. Nor should it.
12 It may not even result in the release of any inmates, but that
13 is a result of the absence of any state law vesting SCDC, or
14 any governmental official or body, with the authority to take
15 those actions. To that end, this Court strongly encourages
16 the Board of Pardons and Paroles to use every means available
17 to fairly exercise its parole power. That may mean having
18 extra hearings and using remote video conferencing technology.
19 If that's the case, so be it. That is the job at hand, just
20 like holding hearings and resolving cases is this Court's job.
21 And we all must adjust to this pandemic so we can best serve
22 the citizens of the State of South Carolina, including those
23 citizens who are wards of the State.

24 Now, with respect to the Board of Pardons and
25 Paroles, it is my understanding that they have, in fact,

1 increased the number of hearings that they are holding, and
2 that they are trying to expedite cases where they can. I
3 would simply encourage those efforts to be redoubled, and a
4 point of discussion between the parties might be something
5 along the lines of trying to get the cases of the most
6 eligible -- excuse me -- the most vulnerable parole eligible
7 inmates to the top of the list, or perhaps considering
8 requests from the facilities that seem to have been the
9 hardest hit on some type of priority basis.

10 Now folks, I've talked a long time. And I know you
11 feel like a jury who has been a captive audience to a lengthy
12 charge, but I thought it was important to sort of set the
13 table so that you would know where the Court is. At this
14 point what I would like to do is open up the floor because
15 this is a status conference for the respective parties to let
16 me know where you are in connection with this case. And I
17 would like for each of you to specifically address whether you
18 want some time for additional discussions, whether you want me
19 to go ahead and rule in the next few days, or whether you
20 would like to have another shot at a facilitated discussion
21 with Judge Hodges, I have already spoken with her, and she
22 will be happy to serve in that role if you think it would be
23 beneficial. Now, I will hear from the petitioners first, and
24 I know that we have some counsel for the petitioners here. I
25 know we have some who are participating by video conference.

1 And I will play no favorites based on physical presence. So,
2 if someone on video wants to respond to the Court, I'll be
3 happy to hear from you. So, Mr. Winn?

4 **MR. WINN:** Thank you, Your Honor. On behalf of the
5 petitioners, I'm Marshall Winn, for the record. We really do
6 appreciate the Court's previous rulings expediting matters in
7 this case. It's a serious case as the Court has aptly
8 indicated. The Court has actually recited several of the key
9 considerations that the petitioners have in this case. And
10 based upon discussions that we have had principally with
11 counsel for the Department of Corrections, I think there is a
12 reasonable basis for us to expect to have some good faith
13 discussions within the next very few days with a view towards
14 perhaps coming to an agreement on new procedures, which can be
15 implemented within the Department of Corrections, particularly
16 in those facilities where the need is greatest. We do point
17 out that for many of the facilities that currently -- I
18 believe I'm looking at the same figures that the Court has,
19 that are showing no cases, that may largely be the result of
20 the fact that there has been no testing. Testing is something
21 that we think is very important, obviously. And I think
22 frankly that the Department of Corrections would agree with
23 that. It's a matter of --

24 **THE COURT:** And I would hope, Mr. Winn, at this
25 point testing seems to be more readily available than it was

1 at the time the petition was filed. So, I --

2 MR. WINN: Yes, sir.

3 THE COURT: -- I would hope that that would be
4 something that could be worked on.

5 MR. WINN: We completely agree with that. And there
6 are -- obviously we know that there are federal funds made
7 available for these kind of things, and simply a matter of
8 whether the Department of Corrections can move forward in
9 implementing these kind of perfectly reasonable and entirely
10 human things that I think everybody agrees need to be done.
11 Therefore, our suggestion would be, and this is the
12 petitioners' suggestion. We haven't discussed this. And I
13 cannot say, and I will not represent to the Court that we have
14 any agreement with the Department of Corrections. But we
15 believe that it would be appropriate for the Court to consider
16 asking us, that is the petitioners and the Department of
17 Corrections and other defendants as they may see fit, to
18 report back in seven days. My hope would be that we will have
19 seen some very substantial progress by that time and can
20 recommend to the Court at that point perhaps a stay pending
21 further resolution of the matter. If, in what I hope is the
22 unlikely event that we would have to come back and say there
23 hasn't been any progress, we don't see any movement in the
24 direction that we believe is appropriate, then we would move
25 to amend our pleadings perhaps along the lines that the Court

1 has suggested. We have already been very much in
2 consideration of that.

3 **THE COURT:** All right.

4 **MR. WINN:** Thank you, Judge.

5 **THE COURT:** Thank you, sir.

6 **MR. WINN:** And please, let me call upon Mr. Hughes
7 and Ms. O'Connor and Ms. Dunn to comment because they
8 obviously have been in this case much longer than I have.

9 **THE COURT:** I understand that. And you anticipated
10 my next move, which was to ask if any of the other
11 petitioners' counsel would like to comment further.

12 **MR. HUGHES:** Thank you, Your Honor. This is
13 Jonathan Hughes for the petitioners. I think Mr. Winn
14 expressed our views well. We do want to thank the Court and
15 its staff for all of the time and consideration you've given
16 to this point. We've heard loud and clear today what the
17 Court has said. Of course when we filed this petition on
18 April 21st, the landscape for some of this litigation was less
19 clear than it is now. We have a benefit of Your Honor's
20 comments of today, and of course a substantial number of
21 orders from other courts around the country that I think have
22 shown how best to style the petition, the complaint where it's
23 best directed, and relief that we would request. I think the
24 Court has indicated quite correctly that I think we're all
25 interested in the same thing. We're interested in making sure

1 that we understand what the threats are in the facilities. We
2 really do think that testing is a key first step, because
3 although it's true that the reports indicated that there
4 aren't positive results at some of the facilities, our
5 understanding is that what's being done presently is testing
6 of symptomatic inmates. And of course as the Court knows
7 because it's indicated it is receiving briefings and staying
8 up on the information about COVID, we know that it's
9 transmitting symptomatically and people don't show symptoms
10 that have it. And so we think one of the key things in order
11 to be able to anticipate future outbreaks, is not be in a
12 situation where we're coming to the Court only when there are
13 death cases instead of at a time when also there's something
14 we can do about it. We heard yesterday that there was a -- we
15 got a report of a death recently at one of the facilities due
16 to COVID of a prisoner who was being kept in quarantine.
17 There's been recent outbreaks at the Tyger River facility that
18 we're quite concerned about. We've heard the Court loud and
19 clear on the need to be narrower targeted. We're going to
20 consider what the Court has said today about availability of
21 state remedies.

22 But finally I will say, Your Honor, we have had an
23 open line of communication. We've spent a fair amount of time
24 talking to Mr. Settana and Ms. Holmes, and we do think that
25 there's reason to think that those discussions could continue

1 and perhaps be productive. And I think the suggestion of
2 reporting back to the Court in seven days with an indication
3 of the next step from our perspective would be appropriate.

4 I think at this stage we would not request that the
5 Court issue the ruling. We've heard the Court's preliminary
6 indications about its concerns. We think it would expedite
7 the matter, frankly, for us to consider amendments, and we
8 understand we would need to request leave to file amended
9 petition or complaints at this point. We'd like to indicate
10 to the Court in seven days what our expectations in that
11 regard are. And, again, thank you for the Court's time.

12 **THE COURT:** All right. Thank you, sir. Anyone else
13 want to comment before I move to the respondents?

14 **MS. DUNN:** No, Your Honor.

15 **MS. O'CONNOR:** No, Your Honor.

16 **THE COURT:** Hearing no further comments from the
17 petitioners' counsel, we'll move to the respondents. And
18 Ms. Holmes, I'll let you go first -- or Mr. Settana.

19 **MR. SETTANA:** Excuse me, Judge, my glasses fog when
20 I put my mask on.

21 Your Honor, I think we're going to defer to the
22 governor's counsel as to where we're heading with this. I
23 will say we have had some discussions, and I just want to add
24 that both my clients, the triple Ps and SCDC, have been as
25 much out in front of this crisis as anybody has in this whole

1 country. I think the whole COVID-19 pandemic has been dynamic
2 from the beginning. It's changed. We're learning more
3 information, more treatment, testing becoming more available.
4 And both agencies are trying to change and get ahead of it.
5 Even as we speak, we know we spoke this morning about things
6 that SCDC is doing to get more testing and to get more test
7 results more quickly, that triple Ps is doing to get more. Of
8 course the whole parole system almost shut down in April when
9 the rest of the country shut down. They're going to be out in
10 front of this by September, October at the latest, but
11 probably September because they're doing just an incredible
12 number of parole hearings as we speak. So, I do think
13 everything you've mentioned as far as your concerns we're
14 addressing right now, Your Honor. Thank you.

15 **THE COURT:** All right. Mr. Limehouse.

16 **MR. LIMEHOUSE:** Thank you, Your Honor. Thomas
17 Limehouse for Governor McMaster. Like all here today, I first
18 want to thank the Court for its time and attention. It's
19 obvious to all involved that a significant amount of energy
20 and interest has been devoted by the Court to this matter. We
21 certainly appreciate that.

22 I think I can speak for all respondents that we're
23 more than happy to continue these discussions, and as SCDC was
24 doing before the lawsuit was filed, continue to collaborate.
25 We certainly appreciate the Court's acknowledgment of Director

1 Stirling's service and all that SCDC and Triple P entities are
2 doing in connection with the ongoing emergency. They will
3 certainly continue to do that. And to the extent that
4 plaintiffs have valuable insight they can offer the process,
5 we're more than happy to discuss that with them. We've had
6 excellent discussions with Mr. Hughes and his colleagues to
7 date, and I have no reason to think that we couldn't continue
8 those discussions over the next seven days and report back.

9 I will note there was a reference to a stay
10 thereafter. I would have some concerns about that approach
11 from a pure state sovereignty, and ongoing concerns about just
12 litigation being stayed is essentially leverage for ongoing
13 discussions. We don't think that would be an appropriate
14 exercise or use of anyone's time, or the Court's jurisdiction.
15 But, again, in the meantime, more than happy to continue with
16 the discussions and report back as the Court sees fit.

17 **THE COURT:** All right. Thank you, sir. All right.
18 I know we've got a large cast of folks here. Anybody else on
19 the respondents side wish to comment at this point? All
20 right. Going once? Going twice? All right.

21 Mr. Settana, let me ask you this. In the last
22 briefing that the federal district judges received from DHEC
23 officials and the physicians at MUSC that are kind of
24 overseeing the State's responses to COVID, it was our
25 understanding that the additional tests that were being

1 received by the State at that point in time, which would put
2 us back mid to late May --

3 **MR. SETTANA:** Yes, sir.

4 **THE COURT:** -- that the State was prioritizing those
5 for primarily two purposes, one, vulnerable adults in
6 congregate settings, i.e. nursing homes and assisted living
7 facilities, and then the other priority was the prison system,
8 was SCDC.

9 Can you give me some idea of not in hard numbers but
10 just, you know, ballpark figures, or percentages, or however
11 you want to describe it, can you give me some idea about how
12 the availability of tests to SCDC has improved since this I
13 think it was filed about the end of April?

14 **MR. SETTANA:** I don't have the numbers.

15 (Attorneys conferring.) (Inaudible.)

16 **MR. SETTANA:** We were at a hundred tests, Judge,
17 from the State. And then there was some additional tests -- I
18 think it was when I spoke with some people the day of the
19 mediation with Judge Hodges was about 150 a week. And they
20 were really only testing those people showing symptoms.
21 That's what we are working on. Now we're working on two
22 things on the testing that I know of. Correct me if I'm
23 wrong. Getting more tests. The directors are beating the
24 bushes to get more tests, and to get the machines to test
25 those so you're not having a three- or four-day turnaround.

1 We have some machines. We have one machine. But as I've
2 learned with my own law firm last week, we had to get
3 everybody tested because someone in the firm tested positive.
4 Some machines turn around in six or seven days, and others in
5 a matter of hours. We're trying to get this down. And I
6 think another thing is exploring partnerships with medical
7 providers like MUSC and other medical providers to get this
8 testing to more institutions and get the turnaround faster.
9 Those are the areas we're looking to improve on. As they
10 speak -- as we speak that's what they're working on, Judge.

11 **THE COURT:** All right. Well, when you have a
12 limited number of tests, I mean, obviously I think it's
13 reasonable that those tests go first toward people who are
14 symptomatic. But Mr. Hughes is not wrong. We all know of the
15 risk of asymptomatic infection and spread. And so, you know,
16 that's a worthy goal for you to be working on to the extent
17 you can get additional tests. I also know that all tests are
18 not created equal, and there are some tests out there that
19 while the positive test is pretty reliable, a negative test is
20 about as reliable as a shot in the dark. So, you know, you
21 may still have more people infected than you're showing if you
22 don't have a good test. So, the quality of test is important.

23 All right. Here's what I'm going to do. I'm going
24 to withhold any ruling until no earlier than a week from
25 Friday, which will be July 10th. And I'm going to ask you to

1 give me a joint status report a week from today on Wednesday,
2 July 8th, as to where you are with your discussions. And in
3 your discussions, obviously you principally are going to want
4 to cover how do you try to get the most effective and
5 efficient assistance to these inmates who are the most
6 vulnerable in light of the capacity you have both legal and
7 practical. But I also want you to talk about in terms of if
8 the petitioners are looking at amendment or refile a more
9 focused pleading, rather than having the Court jump through a
10 whole lot of hoops you may want to -- you may want to look at
11 sort of defining your issues. And to the extent you're not
12 able to reach agreement on certain things, limit what -- limit
13 any future filings to specifically where you want to try to go
14 and what you can agree on. Basically I'm asking you if you
15 don't get it all worked out, if it comes back to me, I would
16 prefer a rifle shot to a shotgun, okay?

17 All right. Well, folks, I appreciate your hard work
18 on this. I know that you have spent a lot of time and effort
19 on this. It is a worthy thing to be doing. It is a portion
20 of our population that we are all concerned about because the
21 nature of incarceration is such that it makes transmission of
22 a disease like this highly possible. And the ability to
23 social distance and do some of the things that were being
24 recommended to do is oftentimes not practical. And so it is
25 situation that needs some attention.

1 I will note that based upon the less than stellar
2 job we as un-incarcerated citizens are doing, there's a good
3 argument to be made that the likelihood of you getting COVID
4 is greater outside than inside some of these facilities. And
5 so, you know, to the extent that's the case, I want to
6 congratulate the folks in charge of those facilities and tell
7 you to keep up the good work. Obviously some of that is based
8 on what we know and don't know regarding asymptomatic
9 infections. I would also note, as I did earlier and as I know
10 respondents counsel is aware, you have three or four
11 facilities where work needs to be done. Mr. Hughes I think
12 mentioned Tyger River. That's certainly one of them, but
13 there are two or three others where there are apparently some
14 issues for whatever reason.

15 So, I appreciate your willingness to try to get this
16 worked out for the benefit of all concerned. And I will look
17 forward to hearing back from you middle of next week.

18 This was mentioned in your comments, and I just
19 throw it out because I think it could be a big issue in the
20 case. Regardless of scope and focus of any future petition or
21 amended petition, I also want all of you to look at this
22 question of state court relief and whether that's the
23 appropriate way to go. Federalism concerns require that I
24 look at that first. And so I would ask you to do that
25 likewise. But other than that, see what you can get worked

1 out, and I will look forward to hearing back from you next
2 week. Hope everyone has a safe 4th of July. Safest way may
3 be to spend it at home in your backyard, but be that as it
4 may, everybody have a good afternoon. Stay safe. Thank you.

5 (Court adjourned at 11:25 a.m.)

6

7 CERTIFICATE

8 I, Michele E. Becker, certify that the foregoing is
9 a correct transcript from the record of proceedings
10 in the above-entitled matter.

11

12 /s/ Michele E. Becker Date: 07/02/2020

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Michele Becker, RMR, CRR, RPR
US District Court
District of South Carolina